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NO. ~~2451~~

United States Circuit Court of Appeals

For the Ninth Circuit

R. L. SABIN,

Petitioner,

vs.

BLAKE, McFALL CO., a Corporation,
KNIGHT PACKING CO., a Corporation,
HAZELWOOD CO., a Corporation, and
WM. H. DRYER AND W. W. BOLLAM,
Partners Trading as DRYER, BOLLAM & CO.,

Respondents.

In the Matter of Equal Rights Company, Inc.,
Alleged Bankrupt.

BRIEF OF PETITIONER.

Petition for Revision of a certain order of the United States District Court for the District of Oregon.

SIDNEY TEISER, Attorney for Petitioner.

SEITZ & CLARK and BARGE E. LEONARD,
Attorneys for Respondents.

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BOYER PRINTING COMPANY, PORTLAND, OREGON

NO. 2451

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BRIEF OF PETITIONER.

Petition for Revision of a certain order of the United States District Court for the District of Oregon.

STATEMENT OF THE CASE.

On the 8th day of September, 1914, an involuntary petition in bankruptcy was filed in the District Court of the United States for the District of Oregon by certain petitioning creditors, respondents herein, praying for the adjudication in bankruptcy of the Equal Rights Company, Inc., a corporation. R. L. Sabin, the peti-

tioner herein, having asked for and obtained leave to intervene as a creditor in the bankruptcy proceedings, filed therein a motion to dismiss the involuntary petition. The motion was heard by the court and sustained. Whereupon, the petitioning creditors asked for and obtained leave to file an amended petition, and accordingly, on the ~~18th~~ 26th day of ~~November~~ September, 1914, they filed such amended petition. Thereafter R. L. Sabin, the petitioner herein, filed a motion to dismiss said amended petition, which motion was duly heard by the court and sustained. The petitioning creditors again asked for and obtained leave to file a second amended petition, and said petition was accordingly filed on the 26th day of October, 1914. R. L. Sabin, petitioner herein, again moved to dismiss, and the motion was accordingly sustained, by an order entered the 16th day of November, 1914, in which order the court granted to said petitioning creditors five days within which to file a third amended petition. The time, therefore, within which said amended petition under said order should have been filed, expired on the 21st day of November, 1914; and no petition had then been filed. However, on the 23d day of November, 1914, two days after the time had expired within which the petitioning creditors were granted leave by said order to file their third amended petition, respondents moved the court, ex parte, for further time within which to file their amended petition, the bench at that time being occupied by a judge other than the one granting the former order, and the court then granted said movants until the 23d day of November, 1914, within which to file their said third amended petition.

The two orders are set forth in the Transcript of Record, pages 11 and 12 respectively.

However, the petitioning creditors, respondents herein, did not even then file their amended petition within the time limited in the second order, and did not file the same until the 25th day of November, 1914. Whereupon, on the 3d day of December, 1914, R. L. Sabin, petitioner herein, filed his motion to dismiss said third amended petition, (Transcript of Record, p. 22), which third amended petition, denominated by petitioning creditors "Second Amended Petition," is set forth in the Transcript of Record, p. 14. The motion to dismiss was based essentially upon the same grounds as are hereinafter set forth as specification of errors to be relied upon herein.

In the involuntary petition last filed by the petitioning creditors, the only allegation as to the character of the corporation prayed to be adjudged a bankrupt appears in that portion of the petition setting forth its location and the duration of its principal place of business, wherein it is stated that said corporation "as such was engaged in the general retail merchandise business." (See paragraph I of said petition, Transcript of Record, p. 15.) The petition does not allege or show the nature of one of the petitioning creditors' claim, that of Dryer, Bollam & Co., except as follows:

> "Money due on open account from Equal Rights Co., Inc., a corporation, upon a stated account rendered July 2, 1914,"

(Transcript of Record, p. 16), and the verification of

each of the creditors to said petition is that the statement of facts contained in the petition "is true as I *verily believe.*" (Transcript of Record, pp. 18, 19 and 20.)

QUESTIONS INVOLVED UPON REVIEW.

The questions involved in this review are:

1. SHOULD NOT THE MOTION TO DISMISS THE THIRD AMENDED PETITION HAVE BEEN SUSTAINED WHERE SAID THIRD AMENDED PETITION WAS FILED, UNDER THE CIRCUMSTANCES NARRATED ABOVE, AFTER THE TIME ALLOWED BY THE FIRST ORDER GRANTING LEAVE TO AMEND HAD EXPIRED, AND AFTER THE EXPIRATION OF THE TIME LIMITED IN THE SECOND ORDER (WHICH ORDER IN ITSELF WAS TAKEN AFTER THE TIME GRANTED IN THE FIRST ORDER HAD EXPIRED)?

2. SHOULD NOT THE MOTION TO DISMISS THE THIRD AMENDED PETITION HAVE BEEN SUSTAINED WHERE THE SAID PETITION DOES NOT STATE, EO NOMINE, OR IN EFFECT THAT THE CORPORATION PRAYED TO BE ADJUDGED A BANKRUPT WAS A "MONEYED, BUSINESS OR COMMERCIAL CORPORATION," BUT MERELY STATES THAT THE CORPORATION WAS "ENGAGED IN THE GENERAL RETAIL MERCHANDISE BUSINESS," AND DOES NOT STATE THAT IT WAS PRINCIPALLY SO ENGAGED, AND DOES NOT NEGATE THAT IT WAS A RELIGIOUS, EDUCATIONAL, CHARITABLE OR NON-COMMERCIAL CORPORATION?

3. SHOULD NOT THE MOTION TO DISMISS THE THIRD AMENDED PETITION HAVE BEEN SUSTAINED WHERE THE SAID THIRD AMENDED PETITION DOES NOT SET FORTH WITH CONSISTENCY AND CLEARNESS THE CHARACTER OF A PETITIONING CREDITOR'S CLAIM, ESPECIALLY WHERE, IF SAID PETITIONING CREDITORS CLAIM WERE ELIMINATED, THE JURISDICTIONAL AMOUNT OF FIVE HUNDRED DOLLARS WOULD BE LACKING?

4. SHOULD NOT THE MOTION TO DISMISS HAVE BEEN SUSTAINED BECAUSE THE VERIFICATION TO THE THIRD AMENDED PETITION WAS MERELY UPON BELIEF AND NOT UPON KNOWLEDGE?

SPECIFICATIONS OF ERRORS.

As already intimated, the errors relied upon by petitioner herein, and which are intended to be urged in this petition for review, being the same errors as set forth in the assignment of errors contained in the Transcript of Record, p. 5, are that the order denying and overruling the motion to dismiss was erroneous in matter of law because:

1. The third amended petition was not filed within the time allowed by the order of November 16, 1914, granting leave to amend, and the order of November 23, 1914, granting further time, was not taken until after the time allowed to amend by said former order had expired; nor was said amended petition filed even then until after the expiration of the time limited by said latter order of November 23, 1914.

2. There is nowhere alleged in said involuntary pe-

tition in bankruptcy, with that degree of particularity required in pleading, or at all, that the alleged bankrupt corporation comes within one or more of the permitted classes of corporations made amenable to the involuntary fetaure of the bankruptcy act.

3. The petition does not show or allege with the particularity required in pleading the nature of the claim of one of the petitioning creditors (that of Dryer, Bollam & Co.), and the statement of the nature of said claim is in itself inconsistent; and without said claim the amount of the petitioning creditors' claims would be below the jurisdictional limit, namely $500.00.

4. The verification of the petition is not sufficient, nor as provided by the official forms in bankruptcy promulgated by virtue of the Bankruptcy Act of 1898, as amended.

DISCUSSION.

An outline of the questions involved has been given already with sufficient detail, and it will not again be here repeated, but we shall proceed with a discussion of the law involved under the various contentions. Taking up then, the questions under the heads outlined in the assignment of errors:

SHOULD NOT THE MOTION TO DISMISS HAVE BEEN SUSTAINED BECAUSE THE THIRD AMENDED PETITION WAS NOT FILED WITHIN THE TIME LIMITED BY THE ORDER GRANTING LEAVE TO FILE AND THE ORDER EXTENDING SAID TIME?

It will first be noted that there had been filed in this matter prior to the last amended petition, three petitions, each of which had successively been held by the court to have been faulty, and the petitioning creditors had upon three occasions prior to this motion been granted leave to amend their faulty petitions. The fourth application for leave to amend was made at the time that the motion to dismiss the third petition was sustained. No petition had ever been presented stating the cause of the error in the prior petitions, as prescribed by General Order 11 of the Bankruptcy Act, and while it is not contended that the court did not have jurisdiction without the filing of such petition to permit amendments, yet where the amendment is allowed without an assignment of the cause of the error in the faulty petition, it is urged that the amendments should be permitted to be filed with less readiness than if such petition had been filed. The court, in the order sustaining the petition to dismiss, added to the words of the order dismissing the petition the words "with leave to amend within five days." (Transcript of Record, p. 12.) The amendment, as heretofore stated, was not filed within the five days, and on the seventh day an order was obtained from the court (the bench being occupied at the time by a judge unfamiliar with the proceedings already had, and of course, other than the judge granting the original order) permitting the amendment to be filed up to and including the 23d day of November, 1914, (Transcript of Record, p. 13); *but the amendment was not even then filed within the time limited in the second order.* It is con-

tended that this second order, entered *after* the time limited in the original order had expired, was beyond the jurisdiction of the court to make, and that even had it been complied with, the petition should not have been allowed to have been filed; but this question need not be argued, since the petition was *not filed even within the time specified within the latter order.* It is earnestly contended that by virtue of the order of November 16, 1914, the involuntary petition on the fifth day from the entering of said order was in itself dismissed, unless there had been filed on that date the amended petition, or unless an order had been entered *prior* to the expiration of that day extending the time to file said amended petition, and said amended petition had been filed within the time so extended. In other words, the order was a dismissal of the petition, which dismissal was to become a final order on the fifth day thereafter unless an amended petition had *within that time been filed;* and certainly, even admitting that the order of November 23, 1914, was a proper order and extended the time to and until the 23d day of November, 1914, *unless the amended petition had been filed within the time limited in that order, the order dismissing the petition of November 16, 1914, then became a final order.*

A case very much in point, and even stronger than the case at bar, is that of *Brown v. Easterling, 59 S. C. 472, (38 S. E. 118).* There a demurrer to a complaint was sustained and leave was given to plaintiff to file an amended complaint "within twenty days from this date." The complaint was not filed within the time and after the expiration of the same an order was pro-

cured from a succeeding judge of the same court granting five days from the date of the latter order to file the amended complaint, from which order the defendant appealed. Said the court, after stating the facts:

> "In this case when the demurrer was sustained, that was the end of the case, and the defendant could have entered judgment thereon, unless the plaintiff availed herself of the privilege, granted by Judge Townsend's order (the first order) of serving an amended complaint within the time limited for such purpose by said order, and having failed to do so, the defendant could, upon the expiration of such time, have entered judgment upon the demurrer, and hence the order became a final order, which no other Circuit Judge had any power to modify (p. 478). . . . If these attorneys found that they could not prepare and serve the amended complaint within the time prescribed by the order of Judge Townsend . . . their remedy was to apply to Judge Townsend before the twenty days expired for an extension of the time allowed." (p. 482.)

The court, therefore, held that the lower court erred in making the second order, and therefore that the amended complaint was improperly filed.

Another case also in point is that of *Haight v. Schuck, 6 Kan. 192, 198.* There a petition was filed and summons served upon the plaintiff in error, Haight, defendant below, who did not answer within the time required and was in default, but plaintiffs did not take judgment, but asked leave to amend their petition and were granted leave to file same "within ten days." They failed to file the amended petition, at least, within the

time allowed. Judgment was rendered upon default in favor of the plaintiff, to which Haight, the defendant below, appealed, taking the position that since the amended petition was not filed within the time allowed, there was nothing of record upon which to base a judgment by default, and that the so-called amended petition was a nullity. Said the court:

> "If the plaintiffs failed to file such amended petition within the time fixed by the court, they would then have had no right and should not have been allowed to file it at all, unless by further order of the court, and in case of such failure and no further order being obtained, they would have been refererd to and must have relied upon the original petition."

The appellate court then held that not having amended his complaint within the time allowed, his rights would be referrable to the original complaint, and Haight, not having answered that, default was proper against him upon the original complaint.

There are several cases not directly in point, the language of which, however, enunciates the principle of law herein contended for. These cases are:

Waller v. Clarke, 132 Ga. 830; 64 S. E. 1096.
Carter v. Page (Cal.), 20 Pac. 729.
Vestal v. Young, 82 Pac. 381; 147 Cal. 715.

In the first of these cases an order was made sustaining the demurrer to a petition and granting plaintiff thirty days within which to file an amended petition. The thirty days expired before the amended petition was filed, and application was made to the court to grant

leave to file the amended petition, which application the court denied; whereupon, the plaintiffs appealed. In discussing the question, the appellate court, in the course of its opinion, said:

> "The court committed no error in refusing to re-open the case and allowing the plaintiff to amend. When the order . . . was passed that the petition be dismissed unless the plaintiff amended within thirty days, the plaintiff ought to have accepted, or excepted, but it did neither. It did not accept the terms of the order by offering an amendment within thirty days, nor did it except by filing exceptions within the time required."

The court therefore held that the order allowing the plaintiff to amend merely gave the plaintiff the privilege to amend to prevent dismissal, and under the facts in this case this order was a final order.

In *Carter v. Page (Cal.), 20 Pac. 729,* the court held that the fact that the amended complaint was not filed within the ten days allowed, but was filed thereafter, could not be taken advantage of upon an appeal upon the merits, but that it could be reviewed only upon a record made on motion in the court below to set aside the judgment based on such complaint, and on an appeal from an order denying such motion; from which can be clearly inferred that had the matter been brought properly to the attention of the appellate court, the court would have held that the amended complaint was improperly filed.

And in *Vestal v. Young, 82 Pac. 381, 147 Cal. 715,* the court there, passing upon a situation which was the

converse of the situation arising in *Brown v. Easterling, 59 S. C. 472 (38 S. E. 118)*, heretofore discussed, held that where time was given to amend a complaint the court had jurisdiction *before* the expiration of the time so given, to grant successive orders extending the time, from which the inference is to be drawn that had the court not granted the successive orders *before* the expiration of the time given within which to file the amendments, the successive orders would have been improper.

It may be stated that careful search has been made of the cases, and that no case has been found wherein it is held upon similar facts to the case at bar that an amendment pleading was proper to be filed.

It is, therefore, respectfully urged that the failure of petitioning creditors to amend within the time granted and extended put the petitioning creditors out of court and that they had no standing whatsoever when they attempted to file and did file the so-called amended petition; and the third amended petition, denominated "Second Amended Petition" by petitioning creditors, should have been dismissed because improperly filed. Having already been finally disposed of under the order of November 16, which order became a final order on November 23, upon petitioning creditors' failure on that date to file their third amended petition, the court erred in not dismissing the petition filed after the time limited and extended had expired.

If this court sustain the position taken by the petitioner herein, and it is confidently believed that it will, this brief might well end here. However, assuming for the argument's sake, that this position of petitioner

herein is without merit, although the assumption is difficult, we will proceed with the other errors assigned, any one of which, if well taken, must result in a revision of the order of the District Court. Proceeding, therefore, with the discussion.

THE PETITION DOES NOT ALLEGE THAT THE CORPORATION IS SUCH AS IS AMENABLE TO THE INVOLUNTARY FEATURE OF THE BANKRUPTCY ACT.

It is a fundamental rule of pleading that in a pleading "that construction shall be adopted which is most unfavorable to the party pleading."

Tyler's Stephen on Pleading, p. 333.
Chitty on Pleading (16th Ed.), p. 337.

Of course, the "petition in bankruptcy is a pleading, and should conform to the usual rules of pleading in the manner of statement."

Remington on Bankruptcy, Sec. 251, p. 191.
In re Farthing, 29 Am. B. R. 732, 738; 202 Fed. 557, 562.
Clark v. Henne & Meyer, 11 Am. B. R. 583; 127 Fed. 288, 296, (C. C. A. 5th Cir.)

As stated by Collier in his work on bankruptcy:

> "If the petition be against the corporation it must distinctly allege that it comes within one or more of the permitted classes. The amendment of 1910, extending the law to practically all business and commercial corporations, has not modified the application of this rule. It should still be clearly alleged in the petition that the corporation is a moneyed, business or commercial corporation."

Collier on Bankruptcy (10th Ed.), p. 134.
Black on Bankruptcy, Sec. 132, p. 322.
Remington on Bankruptcy, Sec. 242, p. 186.

Does the petition at bar come within these principles of pleading?

Before entering into a discussion of this question, however, it should be recalled that courts of bankruptcy are courts of limited jurisdiction, their jurisdiction being bounded by the Bankruptcy Act.

Collier on Bankruptcy, 10th Ed., p. 23.
Loveland on Bankruptcy, 4th Ed. Sec. 191, pp. 396, 397.

All the requisites therefore enumerated in the Bankruptcy Act for the adjudication of an involuntary bankrupt, should clearly appear in the petition.

The involuntary petition in this case alleges, in paragraph I thereof, that the Equal Rights Company, Inc., is duly incorporated under the laws of the State of Oregon, with its principal office in the City of St. Johns, Multnomah County, Oregon; that the corporation has for the greater portion of six months next preceding the date of the filing of the original petition had its principal place of business in the district of Oregon, "and as such was engaged in the general retail merchandise business," and further alleges, in paragraph II thereof, that it was neither a wage earner nor a person engaged in farming or the tillage of the soil (~~quaere~~ sic) and was not a "municipal, railway, insurance or banking corporation."

It is maintained that the allegations as above set

forth are demurrable, and that the petition to dismiss (which under the new equity rules supplants a demurrer) should have been sustained. It will be noted that it is not alleged that the corporation was *principally* "engaged in the general retail merchandise business," which might even under the Act as amended be sufficient in this instance, nor is it anywhere alleged that it was a "moneyed, business, or commercial corporation."

Fortunately, a case very much in point arose in Oregon under the Bankruptcy Act of 1867. (The applicability of the decisions concerning involuntary corporate bankrupts under that Act to the proper interpretation of the like section of the present Act will be hereafter fully discussed). In that case the petition alleged that the Oregon Bulletin Printing and Publishing Company was a private corporation formed under the laws of Oregon, and that its principal place of business was in Multnomah County, and it was argued that these allegations taken together with the fact that the name of the corporation indicated clearly that it was organized for the purpose of engaging in and carrying on the business of publishing and printing, showed sufficiently that it was a business corporation. The question first arose upon requested instructions to the jury called to try the question of insolvency, and it was held by the trial judge, the late Judge Deady, who expressed some doubts as to the correctness of his ruling, that the petition having been answered and the point not raised in the pleadings, it was too late to take advantage of the point at that stage of the issue. See *In re Oregon Bulletin Printing*

& Pub. Co., Fed. Case No. 10559, 18 Fed. Cas., p. 773, 780, (first column.)

The case was appealed to the Circuit Court upon this and other questions, *Oregon Bulletin Printing & Pub. Co., Fed. Case No. 10561, 18 Fed. Cas., p. 780, 791,* and there Circuit Judge Sawyer held that whether or not the ruling of the trial judge was correct as to the timeliness of raising the question, the petition undoubtedly was demurrable. Said Judge Sawyer (at p. 791, first column):

> "There is no allegation in the petition in this case, that the corporation is either a 'moneyed, business or commercial corporation,' and the character of the corporation can only be inferred from the name and averment that its place of business is at Portland. The petition would undoubtedly be held bad on demurrer."

Now discussing for a moment the successive bankruptcy acts and amendments so as to call the attention of the court to the successive changes in this particular phase of the bankruptcy acts, it will be recalled that section 37 of the Bankruptcy Act of 1867 made "all moneyed, business or commercial corporations and joint stock companies," without exception, subject to the compulsory feature of the Bankruptcy Act, while the Act of 1898 provided that any corporation "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits" may be adjudged an involuntary bankrupt, and by the amendment of 1903 mining corporations were included in the provision.

However, because of the unsatisfactory and unequal

applicability of this law to various corporations, as developed in practical operation, Congress modified and enlarged the provision and more nearly assimilated it to the law of 1867, correcting some of its harsher features by specifically excepting certain classes of corporations, so that the present Act, as amended in 1910, is practically the same as that of 1867, so far as involuntary bankruptcy of corporations is concerned, and reads as follows:

> "Any moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation . . . may be adjudged an involuntary bankrupt."

The phrase, therefore, "moneyed, business or commercial corporation" (but not the exceptions which follow) being directly copied from the Bankruptcy Act of 1867, shows the intention of Congress that it should have the same interpretation which it then bore.

Black on Bankruptcy, Sec. 141, p. 347.

Hence the definitions and decisions made concerning it by the Federal Court when administering the earlier statute, are now binding authority.

Black on Bankruptcy, Sec. 141, p. 347.
In re R. L. Radke Co. (Dist. Ct. N. D. Cal.), 27 Am. B. R. 950; 193 Fed. 735.

Therefore, turning to the decisions, which, however, are not numerous in this regard, under the Act of 1867, we find that certain classes of corporations were not then amenable to the involuntary features of the Bankruptcy Act, and therefore that they are not now amen-

able to it under the present Act (disregarding, for the time being, the exceptions mentioned in the amendment of 1910). For example, it was held under the former act that "corporations not organizd for profit, viz.: religious, charitable, literary, educational, municipal and political corporations" could not be adjudged involuntary bankrupts because they were not "moneyed, business or commercial corporations."

> *Black on Bankruptcy, Sec. 142, p. 349.*
> *Winter v. Iowa M. & N. P. Ry Co., Fed. Case No. 17890, 30 Fed. Cas., 329, 330.*
> *Alabama & Chattanooga R. Co. v. Jones, Fed. Case No. 126, 1 Fed. Cas. 275, 278, (first column.)*
> *Sweatt v. Boston H. & E. R. Co., Fed. Case No. 13684, 23 Fed. Cas., 530, 534, (first column.)*

Said the court in the case of *Winter v. Iowa M. & N. P. Ry. Co., Fed Case No. 17890, 30 Fed. Cas., 329, (first column)*:

> "In my judgment the purpose of Congress in the use of the language above quoted from section 37 (Act of 1867), was to include all corporations of a private nature, organized for pecuniary profit . . . and would exclude corporations of a public, civil or municipal character, as well as those organized purely and strictly for religious, charitable, educational and like purposes."

Now, leaving general principles and returning to the case at bar, it is contended that the allegation that the Equal Rights Company, Inc., was "engaged in the general retail merchandise business" does not bring it into

the class of "moneyed, business or commercial" corporations, for the reason that the Equal Rights Company, Inc., may be a philanthropic organization and still be engaged in the "general retail merchandise business" incidentally. The least allegation that would bring this corporation under the Act would be that it was *principally* so engaged, but this allegation is not in the petition. As just stated, the Equal Rights Company, Inc., may be a charitable or educational organization and yet incidentally and spasmodically may engage in the "general retail merchandise business." Just, for instance, as Reed College, an educational corporation of the State of Oregon, is unquestionably engaged in the rental business, owning numerous business and residential properties which it holds as its endowment, and from the income of which it exists, and yet that corporation would not be amenable to involuntary bankruptcy. Leland Stanford University, as an incident to its educational purposes, may, and it is believed does, conduct a store for the sale and purchase of text books and stationery for the convenience of its students, and if it does so conduct such a store, it would certainly be engaged in the "general stationery business," and yet, conducting this business incidentally, it would not be amenable to involuntary bankruptcy. Numerous universities for educational purposes operate printeries, publish and sell books, tracts, magazines and even newspapers, and therefore engage in the general publishing business, as a part of their general educational purpose, but it need not be asserted that such universities are not "moneyed, business or commercial corporations," and hence not amenable to the involuntary bankruptcy phase of the Act.

It is therefore concluded that the allegation contained in the petition at bar is not such an allegation as is required by the rules of pleading already adverted to, and that the petition is therefore demurrable.

In the case of *Sweatt v. Boston H. & E. R. Co., Fed. Case No. 13684, 23 Fed. Cas., 530, 534, (first column)*, discussing the amenability of a railroad corporation to the involuntary features of the Act of 1867, it is said:

> "Religious, charitable, literary and educational corporations are not subject to the Bankrupt Act, nor are corporations created for political purposes, even though they or some of them may transact large amounts of business, as their chief and ultimate purpose shows that they are not properly denominated moneyed, business nor commercial corporations."

And in the case of *Alabama & C. R. Co. v. Jones, Fed. Case No. 126, 1 Fed. Cas., 275, 278, (first column)*, in discussing the question as to whether a railway corporation is subject to be adjudged an involuntary bankrupt under the Act of 1867, it is said:

> "It seems to be the clear intent of the thirty-seventh section to bring within the scope of the bankrupt act all corporations, except those organized for religious, charitable, social, literary, educational, municipal or political purposes. These may all be in one sense, moneyed or business corporations, for they must all have and use money and transact business, to some extent, in order to carry out their objects. But we do not call them moneyed corporations as we would a bank, nor do we call them business corporations, as we would a manufacturing or mining company or ex-

> press company, because their chief and primary object is not to transact business or make gain. They necessarily transact business in order to accomplish other ends than the mere doing of business and making profit."

And, as stated in *Black on Bankruptcy, Sec. 142, p. 350:*

> "Religious societies in the United States are almost invariably corporations, and although they may buy and hold real and personal property and perhaps sell some of it again, and though they may raise money for church purposes by fairs and entertainments, conduct parochial schools, and enter into business contracts with employed in their service, yet they are clearly not to be classed as business corporations, for the reasons above given. So the fact that a college may acquire and convey property necessary to the accomplishment of its object, and may charge fees for tuition or instruction, does not make it a business or trading corporation. And again, an incorporated club, of which the principal object is social intercourse, any business conducted by it being merely incidental, is not subject to proceedings in involuntary bankruptcy."

And thus it was held in the case of *In re Fulton Club, 113 Fed. 997, 7 Am. B. R. 670,* decided under the Act of 1898, that a social club whose principal object is social intercourse, was not subject to involuntary bankruptcy, since business conducted by it, such as selling cigars, etc., to members, was not for gain.

Hence, it is maintained that the petition in the case

at bar is faulty and subject to demurrer or petition to dismiss, for the reason just discussed.

SHOULD NOT THE MOTION TO DISMISS HAVE BEEN SUSTAINED BECAUSE THE CLAIM OF ONE OF THE PETITIONING CREDITORS IS NOT ALLEGED WITH THE SUFFICIENT CONSISTENCY AND PARTICULARITY REQUIRED IN PLEADING?

Keeping in mind, then, the general principles of pleading as discussed under the former head, it is maintained that the petition should have been dismissed:

1. Because the claim of Dryer, Bollam & Co., one of the petitioning creditors, was not set forth with the requisite clearness and particularity, and

2. Because the statement of the claim is in itself inconsistent.

The statement of the claim is set forth in the petition as follows:

> "Dryer, Bollam & Co., a co-partnership, money due on open account from Equal Rights Company, Inc., a corporation, upon a stated account rendered July 2, 1914."

In *In re Farthing, 202 Fed. 557, 561,* decided by District Judge Connor of the Eastern District of North Carolina, heretofore cited, the question as to the required particularity and clearness with which a petitioner's claim should be set forth is ably discussed. Says the court:

> "The demurrer challenges the allegations of the petition in this respect, for that the 'nature' of the petitioners' alleged debts is not set forth with sufficient par-

> ticularity to enable the respondent to answer the same intelligently. It must be conceded that there is but little authority upon the question raised by the demurrer. The industry of counsel and my own investigation discover but few decided cases in which it is discussed. Resort must, therefore, be had to general principles of pleading and the 'reason of the thing.' In re White (D. C.) 135 Fed. 199, there was a demurrer to the petition, for that it failed to set out particularly the nature of the debt. Judge Holland said: 'Thus far the petitioners have followed the form prescribed by general order 37 (38) of the Supreme Court prescribing the forms in bankruptcy; but in stating their claims, while the amount is given, the nature of the claim is not set forth, and, in that, it is defective, which, however, can be amended so as to meet the requirements of the act.' "

And it was there held that a petitioning creditors' claim was not set forth with the particularity required and the pleading was therefore demurrable, although it is asserted that the statement of the claim there was even more definitely set forth than in the case at bar, and the court's especial attention is called to this case. As stated in that opinion, there are but few cases upon the subject.

> See also *In re Hadley, Fed. Case No. 5894.*
> *In re White, 135 Fed. 199.*
> *Black on Bankruptcy, Sec. 160, p. 396.*
> *Loveland on Bankruptcy (4th Ed.), p. 414.*

In addition to the lack of clearness and detail with which the claim is set forth, the statement itself is inconsistent. It is asserted that the money is due on *open*

account upon an account stated. It is inconceivable how money could be claimed under both of these allegations. For example, an open account is defined as:

> "An account *not stated* or agreed upon between the parties."
>
> *1 American & English Encyclopedia of Law, p. 435.*

An account stated is defined as:

> "An agrement between the parties who have had previous transactions of a monetary character; that all the items of accounts representing such transactions are true, and that the balance struck is correct, together with a promise expressed or implied for the payment of said balance."
>
> *1 American & English Encyclopedia of Law, p. 437.*

Essentially the same definition is given in *Abbott's Law Dictionary* and *Black's Law Dictionary,* and in *Words and Phrases.*

In the case of *McCammant v. Bastel, 59 Tex. 363, 369,* it is stated that the term "stated account" is used in opposition to "open account;" and so in *Taylor v. Parker, 17 Minn. 447, 451,* it is stated that an account is open and current when it is running, *not closed, settled or stated.*

An interesting case along this line is that of *Holmes v. Page, 19 Ore. 232,* where an "account stated" is defined. There a wife was sued upon an account stated which arose out of purchases made by the wife for family necessities. The account was presented to the husband, who assented to the same, and it was attempted to show

that the husband (being bound for the family necessaries of the wife under the Oregon law), was properly her agent to assent to the account, but the court held that the items of the account were not proper to be shown in the action on an account stated. That the action for the stated account was a new and different action, based on a different promise than the action upon open account, and that therefore the wife was not bound since he was not her agent to assent to the same. It is there stated:

> "It is not disputed that if the goods were bought for family expenses and were used by the family but that the defendant is liable, but she cannot be made liable on a contract based on an account stated between her husband and the plaintiff to which she has not assented."

It is too fundamental to cite or quote further cases or authorities in substantiation of the fact that there is a fundamental contrast between an open account and a stated account, and that an action on one precludes an action upon the other.

Reverting again to the case of *In re Farthing, 202 Fed. 557, 562,* it is there said:

> "In the absence of more direct authority, it may aid us in arriving at a correct conclusion of the question raised by the demurrer to recur to the general rules of pleading. It would seem reasonable and just to apply to the petition in this respect the test by which the sufficiency of a declaration or complaint is measured in an action upon a negotiable instrument (the petitioner's claim which was held demurrable here was upon a promissory note).

> The rule uniformly applied is that material facts should be distinctly, and not inferentially alleged. The court will not supply, by intendment, an averment which the pleader has failed to make. The facts constituting the cause of action should be set forth in the complaint with definiteness and certainty. The plaintiff, in his complaint, should apprise the defendant of the precise grounds upon which he relies."

From which the deduction is clearly to be made that any statement as to a petitioner's claim in a petition in bankruptcy, which would be demurrable in a complaint or bill in an action or suit for its recovery, would be demurrable in a petition in bankruptcy, and it is urgently insisted that the allegation of this petitioner's claim is so inconsistent in itself as to be subject to demurrer.

For the reasons, therefore, that the claim is not set forth with that degree of particularity required in pleading, and that as set forth it is inconsistent, the petition to dismiss the third amended petition should have been sustained.

SHOULD NOT THE MOTION TO DISMISS HAVE BEEN SUSTAINED BECAUSE THE VERIFICATION TO THE THIRD AMENDED PETITION WAS MERELY UPON BELIEF AND NOT UPON KNOWLEDGE?

The last point to be raised is that the petition was not properly verified. It will be remembered that the petitioners verified the petition upon belief and not upon knowledge. It is uniformly held by the Federal courts that the general orders, rules and forms promulgated by

the Supreme Court in accordance with section 30 of the Act, are binding upon courts of bankruptcy.

In re Scott, 99 Fed. 404; 3 Am. B. R. 625.
In re Gerber (C. C. A. 9th Cir.), 26 Am. B. R. 608, 617.
Collier on Bankruptcy, p. 572.

Form No. 1 and Form No. 2 of the Official Forms, promulgated by the Supreme Court, prescribe a verification according to knowledge, information and belief. Official Form No. 3, promulgated by the Supreme Court, provides an absolute verification by the petitioning creditors to the effect that "the statements contained in the foregoing petition subscribed by them are true." The variance between the verification required by No. 1 and No. 2, and the verification required by Form No. 3, is significant, and the reason seems to be apparent. Form No. 1 and Form No. 2 are forms of voluntary petitions upon which an adjudication is immediately made, and to which no opposition or answer is permitted. Form No. 3 is a pleading upon which contests are permitted and are usual, and are, as to the alleged bankrupt at least, of grave import. Irreparable damages can result therefrom if involuntary petitions are improperly brought, or if brought upon rumor or belief, and the requirement as set forth in the verification of Form No. 3, that the verification should be absolute, is a requirement, the wisdom of which can readily be understood. This question is also discussed in *In re Farthing, 202 Fed. 557, 566,* already much quoted, and it was there held that the verification upon knowledge, information and belief was improper, and that the verification should follow the form prescribed under Form No. 3. Therefore, it

is contended on this ground also that the petition to dismiss should have been sustained.

In conclusion, then, it is earnestly asserted that the third amended petition filed in the case at bar, containing the many defects which it is asserted this petition contained, and filed under the circumstances under which it was filed, was subject to demurrer, and that the petition to dismiss the same should have been sustained, and particular stress is laid upon the fact that if any one of the objections raised herein, having been properly raised in the lower court, were valid objections, then the order of the District Court denying the petition to dismiss should be revised.

While it does not appear in the record of this case, it is not believed improper to state that this is the second involuntary action filed against this corporation. The first petition was amended three times, and finally dismissed without leave to amend, and the same petitioning creditors therein instituted immediately this second proceeding, in which there have been four petitions filed, the three amended ones and the original, and under such circumstances it is respectfully urged that the petition to dismiss should have been sustained by the District Court.

Respectfully submitted,

SIDNEY TEISER,

Attorney for Petitioner.